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Moh Chuan Pin v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–39 OF 2008(R)
ZAKI AZMI CHIEF JUSTICE, ALAUDDIN PCA AND GOPAL SRI RAM FCJ
16 JULY 2009

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Criminal Procedure — Appeal — Trial judge's findings — Appellant convicted and sentenced by trial judge for offence of murder — Whether trial judge failed to judicially appreciate defence case — Whether trial judge wrong in relying on evidence of flight by appellant — Whether trial judge should expressly state in judgment that court did not rely on inadmissible evidence — Whether findings of trial judge influenced by inadmissible evidence — Whether judgment flawed — Whether conviction unsafe

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The appellant was convicted and sentenced to death for the offence of murder. His appeal to the Court of Appeal was dismissed, hence the appellant filed the present appeal. During the trial in the High Court, the appellant had elected to give evidence on oath when he entered his defence. During his evidence, the prosecution sought to impeach his credit by relying on a contradictory statement made by the appellant to the police in the course of investigations. The court found the material contradictions but after a voir dire, the court declined to proceed with the impeachment and held that the statement was inadmissible because it was made involuntarily. In the present appeal, the appellant submitted that the learned judge had failed to expressly make it clear in his judgment that he had put the appellant's previous statement out of his mind when considering the defence, as such, the judgment was flawed, and the conviction of the appellant rendered unsafe. The appellant also submitted that the learned judge failed to judicially appreciate the defence case. The argument here was that there was a space of time between PW8's departure and PW10's arrival and it was during this interval that some other person entered the premises and committed the crime. The appellant had gone to use the toilet when this happened. When he returned, he saw what had happened to the deceased and tried to help her. Hence the bloodstains on his person. In relation to the said bloodstains, it ought to be noted that at the trial stage, the prosecution relied on the evidence of PW11 who saw the appellant ran out of the shop in which the incident had occurred, with blood dripping from his right hand. The appellant further argued that the trial judge was quite wrong in relying on evidence of flight by the appellant as there were many cases that have held that mere act of an accused person absconding from the scene was not consistent with guilt. It was evidence of neutral value as an innocent person might flee in panic.

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Held, dismissing the appeal and affirming the conviction and sentence: A

(1) There was nothing in the judgment of the trial judge that carried even a hint that he had relied or indeed even referred to any part of the previous inconsistent statement. It followed that the decision of the trial judge was uninfluenced by anything contained in the statement held inadmissible. In addition, the case of *Public Prosecutor v Jamali bin Adnan* [1985] 2 MLJ 392 was of no assistance to the appellant. The present action was not a case in which inadmissible evidence had been adduced. Had that been the case, then the appellant's complaint might have some substance (see para 5). B C

(2) The weight to be given to the evidence of witnesses, including the appellant was a matter very much for the trial judge to determine. His view on credibility was very much a question of fact. That view was affirmed by the Court of Appeal. It was only in rare cases that the Federal Court would interfere with concurrent findings of fact based on the credibility of witnesses. It would certainly do so where a miscarriage of justice had been occasioned for any reason, including a failure on the part of the trial court to judicially appreciate the totality of the evidence presented. However, this was not such a case. In his carefully considered judgment, the learned judge directed his mind to the defence case and gave cogent reasons for rejecting it. His assessment of the evidence accorded with the probabilities of the case. It was in evidence that there was no door to the shop in question save for that from which the appellant emerged. If the assailant had been some other person, PW11 would have seen him emerge from the shop in question. However, the appellant was the only person to emerge from the shop. The story of another assailant did not therefore ring true (see para 7). D E F

(3) It was quite true that there were cases in which the courts had said that mere evidence of flight was equivocal. But in each of the said case, evidence of flight by the accused was the only circumstance relied upon by the prosecution to bring home the charge. That was not the case here. For, there was other evidence that was consistent with the guilt of the appellant. Further, there were also cases in which the courts had relied on evidence of flight taken together with other relevant circumstances to draw an inference of guilt. In short, the conduct of the appellant in all the circumstances of the case strongly supported the conclusion that none other than he was the assailant who took the deceased's life (see para 8). G H

[Bahasa Malaysia summary I

Perayu telah disabitkan bersalah dan dihukum mati atas kesalahan membunuh. Rayuannya ke Mahkamah Rayuan telah ditolak, maka perayu telah memfailkan rayuan semasa. Ketika perbicaraan di Mahkamah Tinggi, perayu telah memilih untuk memberikan keterangan bersumpah apabila dia

memasuki pembelaannya. Semasa keterangannya, pihak pendakwa berusaha mencabar kreditnya dengan bergantung kepada kenyataan bercanggah yang dibuat oleh perayu kepada polis semasa proses penyiasatan. Mahkamah menemui percanggahan material tersebut namun setelah menjalankan voir dire, mahkamah menolak untuk meneruskan pencabaran tersebut dan berpendapat bahawa kenyataan itu tidak boleh diterima kerana ia tidak dibuat dengan sukarela. Dalam rayuan semasa, perayu berhujah bahawa hakim yang bijaksana telah gagal menyatakan secara jelas dalam penghakimannya bahawa beliau tidak mengambil kira pernyataan terdahulu ketika mempertimbangkan pembelaan, oleh itu, penghakiman tersebut cacat dan sabitan ke atas perayu adalah tidak selamat. Perayu juga berhujah bahawa hakim yang bijaksana gagal menghargai kes pembelaan secara adil. Hujahnya di sini adalah bahawa terdapat ruang masa antara keberangkatan PW8 dan ketibaan PW10 dan sepanjang tempoh inilah terdapat orang lain yang memasuki premis dan melakukan jenayah. Perayu telah pergi menggunakan tandas apabila kejadian ini berlaku. Apabila perayu pulang, dia melihat apa yang telah berlaku kepada si mati dan cuba membantunya. Disebabkan itulah terdapat kesan darah pada dirinya. Berhubung dengan kesan darah tersebut, perlu diingat bahawa pada peringkat perbicaraan, pihak pendakwaan bergantung kepada keterangan PW11 yang melihat perayu melarikan diri dari kedai di mana insiden itu berlaku, dengan darah menitis dari tangan kanannya. Perayu seterusnya mendakwa bahawa hakim bicara telah terkhilaf apabila bergantung kepada keterangan bahawa perayu telah melarikan diri, kerana terdapat banyak kes yang menyimpulkan bahawa perbuatan tertuduh yang melarikan diri dari tempat kejadian tidak konsisten dengan kebersalahan. Ia adalah keterangan dengan nilai neutral kerana seseorang yang tidak bersalah mungkin melarikan diri kerana panik.

Diputuskan, menolak rayuan dan mengekalkan sabitan dan hukuman:

(1) Tidak ada apa-apa dalam penghakiman hakim bicara yang menunjukkan bahawa beliau telah bergantung atau sesungguhnya merujuk kepada mana-mana bahagian kenyataan terdahulu yang tidak konsisten. Oleh yang demikian, keputusan hakim bicara tidak dipengaruhi oleh apa-apa yang terkandung dalam kenyataan yang telah diputuskan sebagai tidak boleh diterima. Di samping itu, kes *Public Prosecutor v Jamali bin Adnan* [1985] 2 MLJ 392 tidak membantu kes perayu. Tindakan semasa bukanlah kes di mana keterangan yang tidak boleh diterima telah dikemukakan. Jika keadaan nya adalah yang sedemikian, maka aduan perayu mungkin mempunyai merit (lihat perenggan 5).

(2) Pemberatan yang diberikan kepada keterangan saksi termasuk perayu adalah perkara yang perlu ditentukan hanya oleh hakim bicara. Pandangannya tentang kredibiliti adalah persoalan fakta. Pandangan tersebut telah disahkan oleh Mahkamah Rayuan. Hanya dalam kes-kes tertentu Mahkamah Persekutuan akan mengganggu penemuan fakta

yang serentak berdasarkan kredibiliti saksi. Mahkamah akan melakukannya jika terdapat ketidakadilan berlaku atas apa-apa sebab, termasuk kegagalan di pihak mahkamah bicara untuk menghargai secara adil keseluruhan bukti yang dikemukakan. Walau bagaimanapun, dalam tindakan semasa, tidak terdapat keadaan seperti itu. Dalam penghakimannya yang dipertimbangkan dengan teliti, hakim yang bijaksana mengarahkan fikirannya kepada kes pembelaan dan memberikan alasan yang jelas untuk menolaknya. Penilaiannya ke atas keterangan sesuai dengan kebarangkalian kes. Adalah terbukti bahawa tidak ada pintu ke kedai tersebut kecuali di tempat di mana perayu keluar. Sekiranya pesalah itu adalah orang lain, PW11 akan melihatnya keluar dari kedai tersebut. Walau bagaimanapun, perayu adalah satu-satunya orang yang keluar dari kedai itu. Oleh itu, kisah mengenai pesalah yang lain itu adalah tidak benar (lihat perenggan 7).

(3) Adalah benar bahawa terdapat beberapa kes di mana mahkamah telah memutuskan bahawa keterangan berkenaan tindakan melarikan diri semata-mata adalah kabur. Tetapi dalam setiap kes tersebut, keterangan berkenaan tindakan melarikan diri oleh tertuduh adalah satu-satunya keadaan yang dirujuk oleh pihak pendakwaan untuk membuktikan tuduhan. Itu bukan keadaannya di sini. Kerana, terdapat bukti lain yang konsisten dengan kebersalahan perayu. Tambahan lagi, terdapat juga kes di mana mahkamah telah bergantung kepada keterangan berkenaan tindakan melarikan bersama-sama dengan keadaan lain yang berkaitan untuk membuat inferens tentang kebersalahan. Secara ringkasnya, perilaku perayu dalam semua keadaan kes menyokong kesimpulan bahawa dia yang telah membunuh si mati (lihat perenggan 8).]

Notes

For cases on trial judge's findings, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1118–1122.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1, SC (refd)
Muthusamy v PP [1948] 1 MLJ 57 (refd)
Nayeb Sahana and Ors v Emperor AIR 1934 Cal 636, HC (refd)
PP v Jamali bin Adnan [1985] 2 MLJ 392 (distd)
PP v Mohd Bandar Shah bin Nordin & Anor [2008] 4 MLJ 556, CA (refd)
Ryan and another v Jarvis [2005] UKPC 27, PC (refd)

Appeal from: Criminal Appeal No R-05–36 of 2003 (Court of Appeal, Putrajaya)

Karpal Singh (Jagdeep Singh Deo and RSN Rayer with him) (Karpal Singh & Co) for the appellant.

Saiful Edris Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Gopal Sri Ram FCJ (delivering judgment of the court):

[1] The appellant was tried and convicted by the High Court at Kangar for the offence of murder and the mandatory death penalty was passed upon him. His appeal to the Court of Appeal was dismissed. He has now appealed to us. The facts relevant to this appeal are as follows.

[2] PW13 (Lai Chwing Churn) runs a shop in Kangar. It is called Kedai Sri Mega Communication. It sells cell phones and other telecommunication equipment. Nor Ayanti (the deceased) was employed there. PW13's father ('PW8') also assisted in the running of the business. On 30 April 2001, at about 2.30pm, PW8 came to the shop. He saw three persons there. They were the deceased, PW9 and the appellant. Shortly thereafter PW9 left. After a brief conversation with the appellant, PW8 left the premises. At about 3pm, PW10 who was working in the shop next to PW13's heard the muffled sound of a lady screaming. He ran next door and tried to enter but found the door locked. He saw someone crouching behind the door. He asked his friend PW11 to watch whether anyone emerged from PW13's shop while he went off to get some assistance. PW11 then saw the appellant run out of the shop in question with blood dripping from his left hand. The appellant entered PW9's motorcycle shop and kept on running. He was pursued by PW9 and PW12 ('PW9's colleague'). PW9 noticed that blood was dripping from the appellant. The appellant sprang into a river, emerged and continued to flee, pushing aside PW12 who tried to apprehend him. Eventually the appellant was apprehended by PW15. The deceased who was initially alive though injured, succumbed to her injuries and died in hospital.

[3] Acting on these facts, the High Court directed the appellant to enter upon his defence. The appellant did so and elected to give evidence on oath. During his evidence, the prosecution sought to impeach his credit, relying upon a written statement made by the appellant to the police in the course of investigations. The relevant parts of the statement that were said to contain the contradictions relied upon were marked and handed up to the judge who, after perusing the relevant parts found material contradictions. However, after a voir dire, he held the statement inadmissible as having been made involuntarily and on that ground declined to proceed with the impeachment. In this he was entirely correct as a witness cannot be cross-examined or impeached upon an involuntary statement (see *Nayeb Sahana and Ors v Emperor* AIR 1934 Cal 636).

[4] Before us, a submission was made that it was incumbent in these

circumstances for the learned judge to have expressly made it clear in his judgement that he had put the appellant's previous statement out of his mind when considering the defence. That did not happen here. Hence the judgment is flawed and the conviction of the appellant rendered unsafe. In support of this argument reliance was placed on *Public Prosecutor v Jamali bin Adnan* [1985] 2 MLJ 392 and the following passage from the judgment of Shankar J (later JCA) was read to us:

> After the defence was called and the accused commenced to give evidence on oath he proceeded to give a detailed account of the questions which were put to him during the interrogation and the answers which he gave. This evidence was designed to establish that at no time did he tell the police that he had firearms or ammunition or that he would lead the police to the place where he buried them. Matters were sought to be brought out as to other friends of the accused, and his relationship with Pie-ie, and his previous visits, and so on and so forth. It was at this point that the court in its anxiety to ensure that inadmissible evidence did not go in by default, invited the close attention of both the defence counsel and the learned deputy public prosecutor to the provisions of s 113 of the Criminal Procedure Code and its impact on s 27 of the Evidence Act. Clearly no caution had been administered to the accused after his arrest and Defence Counsel then suggested that the inadmissible answers should be struck from the record. I notified the parties that this could not be done but that any evidence which was inadmissible would be excluded from my consideration.

[5] It was submitted that the learned judge in the present case ought to have administered unto himself the kind of direction that Shankar J did in the passage above quoted. With respect, we do not find any justification in the complaint made. In the first place, there is nothing in the judgment of the trial judge that carries even a hint of his having relied or indeed even referred to any part of the previous inconsistent statement. It follows that the decision of the trial judge was arrived at uninfluenced by anything contained in the statement held inadmissible. In the second place, we find *Jamali bin Adnan* to be of no assistance to the appellant. In that case what happened was that patently inadmissible evidence had been adduced during the defence case. Shankar J drew attention of this to counsel on both sides. When he did so, counsel applied to have the inadmissible evidence stricken from the record. That very learned judge then correctly notified counsel that that could not be done but assured them that 'any evidence which was inadmissible would be excluded from my consideration'. Nothing of that sort happened here. What happened here is that an impeachment proceeding along the lines as prescribed by Taylor J in *Muthusamy v Public Prosecutor* [1948] 1 MLJ 57 was followed to the letter. Having held the statement inadmissible, the judge went on with the case. Now, if you look at the judgment in *Muthusamy* carefully enough you will find that impeachment procedure requires the court to read the statement. If it finds no material contradiction, it is to hand the statement back. There is nothing in *Muthusamy* that requires a court that has read the statement to

A expressly direct itself that it excludes from its mind any part of the statement tendered in the impeachment process. This appears to fortify the way in which the judge approached the assessment of the evidence in the present case. To reiterate, this is not a case in which inadmissible evidence had been adduced. Had that been the case, then perhaps the appellant's complaint may have had
B some substance. As matters stand it has none.

[6] We next turn to the complaint regarding the assessment of the evidence. It was submitted that the learned judge fell into error in this department
C because he failed to judicially appreciate the defence case. The argument here is that there was a space of time between PW8's departure and PW10's arrival. According to the defence presented, it was during this interval that some other person entered the premises and committed the crime. The appellant had gone to use the toilet when this happened. When he returned, he saw what had
D happened to the deceased and tried to help her. Hence the bloodstains on his person. Further, the judge was quite wrong in relying on evidence of flight by the appellant as there are many cases that have held that mere flight, that is to say, the mere act of an accused person absconding from the scene is not consistent with guilt. It is evidence of neutral value as an innocent person may
E flee in panic. So much for the appellant's case before us.

[7] With respect we are unable to accept the arguments raised. There are two reasons for this. First, the weight to be given to the evidence of witnesses, including the appellant was a matter very much for the trial judge to determine.
F His view on credibility is very much a question of fact. That view was affirmed by the Court of Appeal. It is only in rare cases that this court will interfere with concurrent findings of fact based on the credibility of witnesses. It will certainly do so where a miscarriage of justice has been occasioned for any reason, including a failure on the part of the trial court to judicially appreciate the
G totality of the evidence presented. With respect this is not such a case. In his carefully considered judgment, the learned judge directed his mind to the defence case and gave cogent reasons for rejecting it. It must be said in fairness to the learned trial judge that his assessment of the evidence accords with the probabilities of the case. It is in evidence that there was no door to the shop in
H question save for that from which the appellant emerged. If the assailant had been some other person, PW11 would have seen him emerge from the shop in question. However, the appellant was the only person to emerge from the shop. The story of another assailant does not therefore ring true. And as Lord Hoffmann said in *Ryan and another v Jarvis* [2005] UKPC 27, an appeal from
I Antigua and Barbuda:

> It is of course most unusual for an appellate tribunal to reverse a trial judge's findings on credibility on the ground that the evidence which he rejected has the ring of truth. The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record.

[8] As for the evidence of the appellant's flight it is quite true that there are cases in which the courts have said that mere evidence of flight is equivocal (see, for example, *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1). But if you look carefully enough at all those cases, in each of them evidence of flight by the accused was the only circumstance relied upon by the prosecution to bring home the charge. That is not the case here. For, there is other evidence that is consistent with the guilt of the appellant. And there are cases in which the courts have relied on evidence of flight taken together with other relevant circumstances to draw an inference of guilt (see *Public Prosecutor v Mohd Bandar Shah bin Nordin & Anor* [2008] 4 MLJ 556). In short, the conduct of the instant appellant in all the circumstances of the case strongly supports the conclusion that none other than he was the assailant who took the deceased's life.

[9] We have read and re-read the record of appeal and the judgments of the High Court and of the Court of Appeal but are unable to discover any material upon which it could be concluded that the appellant's conviction is unsafe.

[10] In the circumstances, we have no alternative but to dismiss the appeal and to affirm the conviction and sentence.

Appeal dismissed; conviction and sentence affirmed.

Reported by Dzulqarnain Ab Fatar